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Supreme Court, U.S.
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Supreme Court of the United States.

OCTOBER TERM, 1958.

No. 716.

R. E. PECKHAM, ASSIGNEE AND TRUSTEE,
PETITIONER,

v.

JOSE E. CASALDUC, TRUSTEE, ETC., ET AL.,
RESPONDENTS.

BRIEF OF PUERTO RICO DISTILLING COMPANY IN OPPOSITION TO PETITION OF R. E. PECKHAM FOR WRIT OF CERTIORARI.

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Questions Presented for Review.

The questions presented for review on this petition for writ of certiorari are as follows:

1. Has petitioner set forth a ground for invoking the discretionary jurisdiction of this Court, under the provisions of Rule 19(b) of the Rules of this Court?

2. Did the Court of Appeals for the First Circuit correctly and properly dismiss the appeals of petitioner?

The second question involves a consideration of the result, as well as the language, of the opinion of the Court of Appeals. As appears from the Petition (p. 7), five separate grounds for dismissal were presented to the Court of Appeals. The Court of Appeals selected one of these, stating (261 F. 2d 121, 122):

> "We think it clear that the motion to dismiss must be granted for the reason, *if for no other*, that Peckham never became a party to the proceedings in the lower cor " (Italics supplied.)

The subsidiary questions thus presented are as follows:

(*a*) Did the Court of Appeals correctly dismiss the appeals on the ground that petitioner failed to become a party to the proceedings in the District Court?

(*b*) Would the Court of Appeals have acted correctly in dismissing the appeals on the ground that petitioner had no appealable interest in any order from which he purportedly appealed?

(*c*) Would the Court of Appeals have acted correctly in dismissing the appeals on the ground that the appeals were mere collateral attacks on prior orders of the District Court, which are now final and unappealable?

(*d*) Would the Court of Appeals have acted correctly in dismissing the appeal from the order of April 8, 1958, on the ground that an appeal from an order approving a plan of reorganization under section 174 of the Act lacks the requisite finality for an appeal?

(*e*) Would the Court of Appeals have acted correctly in dismissing the appeals taken on June 13, 1958, on the ground that they were prematurely taken, and that as a result the Court of Appeals was without jurisdiction to hear the same?

Statement of the Case.

Proceedings in the Lower Courts.

On April 6, 1956, Ronrico Corporation (hereinafter sometimes called the "debtor") filed a voluntary petition seeking reorganization under the provisions of chapter X of the Bankruptcy Act (hereinafter called the "Act") (Record Appendix, A1) and on the same day the judge of the United States District Court for the District of Puerto Rico entered an order appointing Mr. José E. Casaldúc as trustee (Record Appendix, A11). The trustee qualified on April 10, 1956, and on April 11, 1956, notice was given to all

creditors and stockholders, and to others who might be interested in the proceeding, including R. E. Peckham (hereinafter called "Peckham"), that a hearing would be held before the lower court on May 18, 1956, pursuant to the provisions of section 161 of the Act.

There were no appearances at the hearing on May 18, 1956, and the trustee continued in possession, operating the business of the debtor without objection from anyone, including Peckham. Among the duties which the trustee discharged was the filing of his report (Record Appendix, A16) as required by the order of his appointment and by section 167 of the Act. This report was filed on March 20, 1957, and copies were furnished to all persons who might be interested, including Peckham (Record Appendix, A17). On April 5, 1957, the lower court entered an order reciting the filing of the trustee's report, and setting a hearing for May 3, 1957, for the purpose of hearing any evidence presented by any interested party who might feel aggrieved by the trustee's said report. Notice of this order was given to Peckham. Peckham did not appear at this hearing, and offered no evidence with respect to the trustee's report, and on May 3, 1957, the lower court entered an order approving the report of the trustee (Record Appendix, A17). No objection was made to, and no appeal was taken from, this order by R. E. Peckham.

The reorganization proceeding itself was precipitated by differences and conflicts between the two major groups of stockholders in the debtor corporation; that is, between Ferd S. Meyer (hereinafter called "Meyer"), as trustee of the Ferd S. Meyer Puerto Rican Trust, and Puerto Rico Distilling Company. In fact, as is set out in the initial petition, the precipitating factor for the entire proceeding was the filing by Meyer of a stockholders' suit in the Court of Chancery of the State of Delaware in and for New Castle County.

The trustee's report of March 20, 1957, had the effect of settling the Delaware suit, and Meyer at first filed objec-

tions to the trustee's report (Record Appendix, A17, A18). However, on April 28, 1957, and in anticipation of the hearing set for May 3, 1957, on the trustee's report, the two contending parties, Meyer and Puerto Rico Distilling Company, entered into a memorandum agreement by which they endeavored, subject to the approval of the lower court, to settle their differences. The memorandum is copied in full in the Amended Plan of Reorganization (Record Appendix, A49) and is in fact made a part of the Plan for certain purposes. It will sometimes be referred to herein after as the "Memorandum of April 28, 1957."

The situation having been thus clarified by the trustee's report, by the Memorandum of April 28, 1957, and by the order of May 3, 1957, approving the trustee's report, the trustee considered that the time was ripe for preparation and presentation of a plan of reorganization, which the trustee presented on May 13, 1957 (Record Appendix, A47, A48). On the same day the lower court entered an order directing that copies be sent to all persons who might be interested, including Peckham, and set June 14, 1957, as the date upon which the lower court would hold the hearing required by section 169 of the Act.

At this juncture, approximately fourteen months after the commencement of the reorganization proceedings, Peckham made, or purported to make, his first appearance, by filing, or purporting to file, through his counsel Jay E. Darlington, three documents, entitled: "Motion of R. E. Peckham to Dismiss the Proceedings" (Record Appendix, A19), "Claims of R. E. Peckham, as Assignee and Trustee for Creditors" (Record Appendix, A20) and "Objections of R. E. Peckham to the Trustee's Proposed Plan" (Record Appendix, A30).

These documents were tendered for filing without prior leave of the lower court; without the filing of any petition for leave to intervene under section 207 of the Act; and without the entry of any order, formal or informal, allowing Peckham to intervene in the reorganization proceed-

ings. No petition for leave to intervene and no order allowing intervention was ever subsequently entered.

The proceedings in the lower court subsequent to the appearance of Peckham are summarized in the order of the lower court, entered on March 21, 1958 (Record Appendix, A74), overruling Peckham's objections to the Amended Plan of Reorganization and denying his motion to dismiss, as follows:

> "Peckham, through his counsel, filed certain objections to the plan as proposed by the Trustee, and filed also a motion to dismiss the proceedings. The motion to dismiss and the objections were essentially based upon the same propositions, which for the most part were argumentative, and not supported by any evidence in the record. One point, which deserved consideration, was the contention that the proposed original plan involved, in substance, a sale of the shares of capital stock of the debtor upon which Peckham claimed a lien, at a price which was alleged to be 'less than one-tenth of its actual fair value'.
>
> "In order to properly consider this objection, the Court at the suggestion of the Trustee, deferred consideration of the proposed plan, and directed that the assets and going concern value of the debtor be appraised by disinterested appraisers. The report of the appraisers was filed with the Court on November 4, 1957, from which it appears that upon the most favorable view of the situation, there is no basis whatsoever for the allegations made on behalf of Peckham to the effect that the provisions in the plan of reorganization were in any way unfair to the common stockholders of the debtor. On the contrary, it appears affirmatively that there is no equity in the debtor for the common stockholders, and that at most the equity for the holders of preferred stock amounts to $52,937.00.

"Peckham, through his counsel, objected to the report of the appraisers; and, as appears from the order entered herein on December 26, 1957, the objections, after hearing, were dismissed, and the report of the appraisers was accepted as an adequate, fair, and proper appraisal of the debtor's property and going concern value, for use by the Trustee in the formulation of a plan of reorganization or as a basis for a report to the Court of his reasons why a plan cannot be effected.

"On January 23, 1957, the Trustee filed an amended plan of reorganization, and by order entered on the same date, the Court directed that copies of the amended plan be furnished to the interested parties, including counsel for Peckham, and fixed February 28, 1958 as a date for a hearing to consider any objections, amendments, or other plans, as might be made or proposed by the debtor, any creditor or stockholder, or any other person or party in interest. No objections were filed to the amended plan, except on behalf of Peckham, who reiterated his original objections and added others of the same nature.

"No evidence has at any time been offered to the Court by Peckham in support of the original objections, filed on June 11, 1957; and no evidence was offered at the hearing of February 28, 1958 in support of either the old or the new objections. In fact, the new objections do not contemplate the introduction of evidence, but in each paragraph expressly rely upon what appears on the face of the amended plan and in the record of the proceedings.

"At the hearing on February 28, 1958, Mr. Darlington stated that he had no evidence to offer in support of his objections, and asked for, and was granted, a period of five days in which to file further specifications and a memorandum in support of his objections. This period has now elapsed, and no supporting me-

orandum or specifications have been filed by counsel for Peckham.

"It appears to the Court that the objections to original plan and to the amended plan which have been filed on behalf of Peckham are based on mere suspicion; have not been supported by any evidence and based wholly upon the unsworn and unsupported statement of counsel for Peckham. The amended plan and the record of these proceedings in no way support Peckham's contentions.

"The objections to the amended plan filed on behalf of Peckham, and the objections filed to the original plan, to the extent that the same are reiterated in the later document, are hereby overruled, and Peckham's motion to dismiss the proceedings is hereby denied."

Peckham took no appeal from the order (accepting the report of the appraisers) entered by the lower court on December 26, 1957 (Record Appendix, A45).

Peckham took no appeal from the order denying his motion to dismiss.

Following the entry of the order of March 21, 1958 (Record Appendix, A74), above quoted, overruling the objections of Peckham to the Amended Plan of Reorganization and denying his motion to dismiss the proceedings, the lower court on April 8, 1958 (Record Appendix, A77), entered its order under section 174 of the Act, approving the Amended Plan for submission to creditors and stockholders, together with its opinion (Record Appendix, A77, A78). On April 10, 1958, a notice of approval of the Plan, with a copy thereof, of the order of approval, a summary of the Plan as approved by the lower court, and a copy of the notice required under section 175 of the Act were served on all persons who might be interested, including R. E. Peckham. The date for a hearing on the confirmation of the Amended Plan was set for May 15, 1958.

The hearing on the confirmation of the Plan was concluded on June 13, 1958, before Judge John W. Delehant. At the hearing on June 13, 1958, Judge Delehant (Record Appendix, A101, A102) announced his intention to overrule the oral objections of Peckham to confirmation, to confirm the Plan, to approve the motion of the trustee for classification of creditors and stockholders, and to approve the mode of consummation of the Plan proposed by Puerto Rico Distilling Company. Counsel for the trustee, Gabriel de la Haba, was charged with the preparation of the orders. The orders in question were signed and entered on June 19, 1958 (Record Appendix, A104, A106, A111).

Peckham appealed (Record Appendix, A103) on June 13, 1958, from the orders which he claims were entered on that date. He filed no subsequent appeals.

The Court of Appeals docketed the appeal from the order of April 8, 1958 (Record Appendix, A77), under No. 5389, and those from the orders purportedly entered on June 13, 1958 (Record Appendix, A112), under No. 5390, and granted a petition for consolidation of the appeals.

The Peckham Case.

Peckham's sole interest in the proceedings arises from the claims which he has asserted in the case of "R. E. Peckham, Assignee, etc., Plaintiff vs. Ronrico Corporation et al., Defendants; R. E. Peckham, Trustee, etc., Intervenor, vs. Ronrico Corporation et al., Defendants," Civil No. 4639 (hereinafter called the "Peckham Case") in the United States District Court for the District of Puerto Rico. Attached to the document entitled "Claims of R. E. Peckham, as Assignee and Trustee for Creditors" are copies of the original complaint in the Peckham Case and of the intervening claim (Record Appendix, A22, A27).

The burden of the original complaint in the Peckham Case is that Peckham is the assignee of a judgment entered

by an Indiana court against Sol Meyer, the father of Ferd S. Meyer; and also the holder of a judgment on the Indiana judgment entered by the United States District Court for the Southern District of Florida; that Sol Meyer, while insolvent, took assets which should have been applied to the satisfaction of this judgment and with them acquired shares of stock in Florida Cane Products Corporation, causing such shares to be issued in the name of his son, Ferd S. Meyer, in the name of his son's wife, Rosalyn Meyer, in the name of his grandson James Meyer, in the name of himself and Ferd as trustees, in the name of Hoke T. Maroon, in the names of Aaron M. Reder and S. Pierre Robineau, and in the names of David L. Hulsman, W. George Kennedy, Jacob G. Gosch and William C. Chadwick; that the major asset of Florida Cane Products Corporation was the equitable ownership of one-half of the capital stock of Ronrico Corporation; that this equitable ownership of one-half of the capital stock of Ronrico Corporation was transferred to the Ferd S. Meyer Puerto Rican Trust, of which the above-named individuals are the equitable owners, "owning the same pro rata interests in said trust assets as they owned as stockholders in Florida Cane Products Corporation.". The purpose of the action is "to subject the interest of all defendants in said Ferd S. Meyer Puerto Rican Trust and in the assets thereof to the payment of the Plaintiff's said judgments." The prayer of the complaint is that the court subject the several separate interests held by each of said defendants in said trust and in the assets of said trust to the payment of plaintiff's said judgments, and to do all things necessary or proper to that end, including the sale of said interests and the application of the proceeds thereof to plaintiff's judgments.

The burden of the intervening claim is that Peckham is the "trustee holder" of a judgment entered by a Florida court against Ferd S. Meyer (not against any other defendant in the principal case); that Ferd S. Meyer, while in-

solvent, became the owner of a one-half interest in a certain invention and subsequent patent, which he converted into a 30% interest in the Ferd S. Meyer Puerto Rican Trust, and, it is alleged, concealed the same by causing the beneficial interest in the Trust to be issued in the name of Hoke T. Maroon as trustee. The prayer is that this 30% interest in the Ferd S. Meyer Puerto Rican Trust be subjected to the payment of the Florida judgment against Ferd S. Meyer, and that the court do all things proper to effect this purpose, including the sale of such interest and the application of the proceeds thereof to such judgment.

The original complaint, it will be observed, seeks to subject to payment of the Indiana judgment only the interest of the named defendants in the Ferd S. Meyer Puerto Rican Trust; and the intervening claim seeks to subject to the payment of the Florida judgment only a described 30% interest of Ferd S. Meyer in the Ferd S. Meyer Puerto Rican Trust.

As the record shows (Record Appendix, A115), the Ferd S. Meyer Puerto Rican Trust was the holder of common stock of the debtor; it was at no time the holder of preferred stock of the debtor (Record Appendix, A117). The common-stock holding of the Meyer Trust in the debtor corporation was originally 625,000 common shares of a par value of 1 per share, which was on June 21, 1955, reduced to 6250 common shares. One-half of the preferred stock issued by the debtor in 1947 was issued to the individual members of the Meyer Trust, but not to the trust (Record Appendix, A117). The preferred stock did not exist at the time of the filing of the original complaint in the Peckham Case, which was on May 20, 1946; it did exist on March 9, 1949, when the intervening claim was originally filed, but the intervening claim makes no mention of preferred stock. Neither the original complaint nor the intervening claim has ever been amended to assert any claim against any portion of the preferred stock of the debtor corporation.

As a matter of fact, the claim of the original complaint in the Peckham Case is not to a full one-half of the common stock of Ronrico Corporation which was formerly held by the Meyer Trust, but only, as stated in the complaint and in the prayer, to "the several separate interests held by each of said defendants in said trust and in the assets of said trust." Certain other beneficiaries of the Meyer Trust, namely, Harry and Fay Herff, Howard Intermill and R. M. Jones, were not made parties to the Peckham Case (Record Appendix, A119). These beneficiaries hold a beneficial interest in the Meyer Trust of approximately 12.68%, leaving the defendants in the Peckham suit with at most 87.32% of the beneficial interest in the trust, or, stated otherwise, a beneficial ownership of 43.66% of the shares of the common capital stock of the debtor.

It accordingly follows that Peckham, as plaintiff in the Peckham Case, has asserted a claim against not more than 43.66% of the common shares of the debtor; and as intervenor a claim against not more than 30% of the Meyer Trust, or 15% of the common shares of the debtor. It is also submitted that Peckham has at no time asserted any claim against any one or more of the preferred shares of the debtor.

The significance of this conclusion lies in the fact that, as is stated in the order of the District Court overruling Peckham's objections to the Amended Plan (Record Appendix, A74, A75), the District Court determined on the basis of an appraisal by three disinterested appraisers that there is no equity in the debtor for the common stockholders. The equity for the preferred stockholders amounts at most to $52,937.

As a result, it would seem to follow that, insofar as the debtor is concerned, Peckham's contingent lien was, prior to confirmation of the plan of reorganization, attached to an asset of no value.

Argument.

Point One.

THE PETITION FOR WRIT OF CERTIORARI STATES NO GROUND UNDER RULE 19 FOR ISSUANCE OF A WRIT OF CERTIORARI.

In Rule 19(b) of its Rules this Court has indicated the character of the reasons which will impel it to issue a writ of certiorari. The petition for writ of certiorari does not state upon which, if any, of the reasons enumerated in Rule 19(b) petitioner relies. From an examination of the petition, however, it would seem that petitioner may contend either that the Court of Appeals "has decided an important question of federal law which has not been, but should be, settled by this court;" or that the Court of Appeals "has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision."

As to the first hypothesis, it has been recognized law since 1936 (*In re Trust No. 2988 of Foreman Trust & Savings Bank* (C.A. 7, 1936), 85 F. 2d 942; cert. den. *sub nom. Tetzke* v. *Trust No. 2988*, 299 U.S. 609, 57 S. Ct. 235, 81 L. Ed. 450) that no one but a party to a suit may appeal, and that under section 77B of the Bankruptcy Act a creditor did not become a party merely because he was heard in the District Court. To become a party under section 77B it was necessary for the creditor to apply for leave to intervene and obtain an order granting him such right.

> *In re Kenmore-Granville Hotel Co.* (C.A. 7, 1937), 92 F. 2d 778; cert. den. *sub nom. Meyer* v. *Kenmore Granville Hotel Co.*, 302 U.S. 767, 58 S. Ct. 481, 82 L. Ed. 596.

This section of 77B (11 U.S.C. 207(c)) was amended by the Chandler Act, and now appears as section 206 of the

Act (11 U.S.C. 606). As is stated in Collier (Collier on Bankruptcy (14th ed.), vol. 6, pp. 2900, 2901):

> "... Section 206, conferring a much broader right to be heard upon the debtor, all creditors, stockholders and indenture trustee, has likewise been interpreted to give to those parties a right to appeal extending, as the section reads, to 'all matters arising in a proceeding.' This marks a variance from ordinary bankruptcy practice, where it is generally held that a creditor may not appeal from an order dealing with another creditor or with matters of the estate not directly affecting his own interest except upon authorization by the court when the bankruptcy trustee fails or refuses to protect the creditors' interests in the situation. It is universally agreed, however, that Congress intended a more extensive right of appeal in Chapter X cases, and section 208, giving the Securities and Exchange Commission under certain conditions the rights of a party in interest but withholding the right to appeal, has been pointed to as indicating legislative awareness that the right to be heard carries with it the right to appeal. ..."

From this it would seem to follow without serious doubt that Congress, in passing the Chandler Act in 1938, was dissatisfied with the rule in the case of *In re Trust No. 2988 of Foreman Trust & Savings Bank, supra*, and, with knowledge of that rule, amended the statute to give creditors and stockholders broader rights of appeal than they had previously enjoyed under section 77B. It would also seem to follow that since, as Collier states, Congress seems to have recognized that the right to be heard carries with it the right to appeal, Congress did not intend to extend the right to appeal to one who could have become, but chose not to, a party by intervention under section 207 of the Act (11 U.S.C. 607).

In any event, the rule has been unquestioned since 1943 that one who can become a party only through intervention under section 207 has no right to appeal if he fails to make application for leave to intervene and fails to obtain an order permitting his intervention.

In re South State Street Bldg. Corp. (C.A. 7, 1943), 140 F. 2d 363; cert. den. *sub nom. Hofheimer* v. *Gold* (1944), 322 U.S. 761, 64 S. Ct. 1279, 88 L. Ed. 1588.

Under these circumstances it is submitted that the federal question, if any, has been adequately resolved, without conflict of authority, in accordance with the intent of Congress; and that there is no compelling reason why the question should now be considered by this Court.

From what has been said it would seem equally apparent that the Court of Appeals for the First Circuit did not in this case depart in any way from the accepted and usual course of judicial proceedings. All the Court of Appeals did was to follow what practitioners have believed to be the law since 1936, except as the same was changed by Congressional action in 1938.

Point Two.

The Court of Appeals Correctly Dismissed Petitioner's Appeals on the Ground that Petitioner had Failed to Become a Party to the Proceedings in the District Court.

There is no common law of bankruptcy. The power of the Congress to legislate with respect to bankruptcy is derived directly from the Constitution (section 8, clause 4). The sum total of the laws relating to bankruptcy now appear in the Bankruptcy Act (herein called the "Act"),

chapter X of the Act, comprising sections 101-276. In section 206 of the Act Congress has stated in express, unmistakable terms who may, as of right, become a party to a chapter X proceeding, as follows:

> "The debtor, the indenture trustees, and any creditor or stockholder of the debtor shall have the right to be heard on all matters arising in a proceeding under this chapter. The judge may, for cause shown, permit a labor union or employees' association, representative of employees of the debtor, to be heard on the economic soundness of the plan affecting the interests of the employees."

In section 207 Congress recognized that there might be others having an interest in the proceeding, and provided:

> "The judge may for cause shown permit a party in interest to intervene generally or with respect to any specified matter. Except where otherwise provided in this chapter, the judge may from time to time enter orders designating the matters in respect to which, the persons to whom, and the form and manner in which notice shall be given."

In the interest of orderly administration of estates of debtors under chapter X, the right of appeal must of necessity be limited to those persons who are parties as of right under section 206, *supra*, or to those who may have become parties by intervention under section 207.

In re Central States Electric Corp. (C.A. 4, 1953), 206 F. 2d 70; cert. den. *sub nom. Henis v. Egan*, 346 U.S. 899, 74 S. Ct. 225, 98 L. Ed. 399.

In re South State Street Bldg. Corp. (C.A. 7, 1943), 140 F. 2d 363, 366; cert. den. *sub nom.*

Hofheimer v. *Gold* (1944), 322 U.S. 761, 64 S. Ct. 1279, 88 L. Ed. 1588.

Intervention is not a mere formality, but requires a formal determination by the lower court of the matters with respect to which intervention is allowed. If this were not so, creditors and stockholders who are parties of right in a chapter X proceeding will find themselves deprived of their undoubted right to oppose a petition for intervention, and to appeal from an order allowing such an intervention. An illustration of the importance of adhering to the statutory procedure appears in *In re V-I-D, Inc.* (C.A. 7, 1949), 177 F. 2d 234; cert. den. *sub nom. Glover* v. *Coffing*, 339 U.S. 904, 70 S. Ct. 518, 94 L. Ed. 1333. It is significant that, in the *V-I-D* case just cited, the appellant was represented by one Jay E. Darlington, of Hammond, Indiana, who appears to be the same counsel who represented Peckham in the lower courts, and who represents him on this petition for certiorari. If this is correct, it would seem to follow that the same counsel who showed familiarity with the procedure under section 207 of the Act in the *V-I-D* case, *supra*, did not fail to make a proper, timely application to intervene in the District Court in this case, through inexperience, ignorance or oversight. It is fair to conclude that counsel's omission was deliberate, and part of an over-all strategy. It is not immediately apparent what counsel's strategy was, but we do know that counsel's entire attitude in the District Court was in defiance of, rather than in subordination to, the main proceedings in the District Court (Record Appendix, A37).

The two *V-I-D* appeals would seem to cast certain light on the subject. In the 1949 episode (177 F. 2d 234, 236) the Court of Appeals for the Seventh Circuit said:

"The petitioner herein did not in her latest petition in the case come in as an intervenor in subordination

> to the main proceedings but rather in defiance thereto 'To seek to set aside the entire proceedings in a case, and to have the same held for naught on the ground that they are absolutely void cannot be in recognition of the propriety of the main suit.'"

In the 1955 episode in the *V-I-D* case (226 F. 2d 113, 114; cert. den. *sub nom. Kelley, Glover & Vale, Inc.*, v. *Coffing*, 350 U.S. 968, 76 S. Ct. 437, 100 L. Ed. 840; rehearing den. 351 U.S. 915, 76 S. Ct. 693, 100 L. Ed. 1449) the same Court of Appeals said:

> "On September 11, 1953, an amended plan of reorganization was submitted by the court appointed trustee. It is this plan which is now under attack, for reasons which we find difficult to comprehend. The strategy of the appellant, however, appears to rest upon the hope that a reversal will result in a dismissal of the proceeding with the rights of the parties relegated to the State courts, where litigation can be renewed and perhaps continue for another ten years."

It is not unfair to assume that counsel is proceeding on a like basis in this case. By refusing to intervene, Peckham avoids a recognition of the propriety of the main proceedings and thus is free, so he hopes, to make any sort of attack on the validity of the main proceedings, with the eventual hope of obtaining a dismissal leaving him free to renew the litigation in another proceeding.

Petitioner now contends that the Court of Appeals, by dismissing his appeals, has denied him the protection of the Fifth Amendment (Petition, p. 9). More correctly stated, it would seem that, for purposes of his own, petitioner knowingly adopted a course of action which led to a dismissal of his appeals.

Point Three.

The Result Reached by the Court of Appeals was Correct on Other Grounds.

A. Petitioner had no appealable interest in any of the orders from which he purportedly appealed.

Petitioner's sole aim and interest in the District Court was to dismiss the proceedings. He at no time objected to the Plan originally proposed by the Trustee, or to the Amended Plan which was confirmed by the District Court, as a Plan of Reorganization. His consistent position was that the proceedings should be dismissed. Petitioner's position in the District Court is plainly stated in his objections (Record Appendix, A30) and in the statement of his counsel to the District Court on July 15, 1957 (Record Appendix, A37).

After hearing counsel on Peckham's motion to dismiss, the District Court on March 21, 1958, overruled his objections to the plan of reorganization, and denied his motion to dismiss (Record Appendix, A74). This was the only order entered by the District Judge by which Peckham could conceivably have been aggrieved. No effort was made to take an appeal from that order.

Instead, Peckham purportedly appealed (Record Appendix, A91) from an order entered by the District Court on April 8, 1958, approving the plan of reorganization for submission to the creditors (Record Appendix, A77). Later, on June 13, 1958, he purportedly appealed from the orders which, so he says, were entered on June 13, 1958. Presumably the appeal was meant to be taken from the three orders entered on June 19, 1958, as follows:

(*a*) An order classifying creditors and stockholders (Record Appendix, A104).

(*b*) An order confirming the Plan of Reorganization (Record Appendix, A106).

(c) An order directing that the consummation of the Plan be carried out in a specific manner (Record Appendix, A111).

Peckham, who merely sought to dismiss the whole proceedings, is not aggrieved by these orders, or any of them. As a matter of fact, the beneficiaries whom Peckham purportedly represents are benefited by the confirmation of the Plan of Reorganization. As has been pointed out, Peckham's contingent liens, if any, attach to the worthless common stock of Ronrico Corporation held by some of the beneficiaries of the Meyer Trust. The District Court, by basing the Plan on the Memorandum of April 28, 1958, rather than on the appraisal, has in effect created an equity for the common stock of Ronrico Corporation where none existed before; and Peckham, without asking for it and over his strenuous objection, has received the benefit of this equity.

It is, or ought to be, obvious that, if Peckham should succeed in obtaining a dismissal of the proceedings in the District Court, the beneficiaries for whom Peckham purports to act will lose the benefits of the Plan as approved and confirmed by the District Court, and consequently will lose the benefits conferred upon them by the Memorandum of April 28, 1958. Peckham and the beneficiaries whom he purportedly represents will be back where they were before; namely, claimants of a contingent lien upon approximately 44% of the worthless common stock of an insolvent corporation.

It is a basic principle that one may not appeal from an order who is not aggrieved by that order.

Ex parte Levitt, 302 U.S. 633, 58 S. Ct. 2, 82 L. Ed. 493.

In re Michigan-Ohio Bldg. Corp. (C.A. 7, 1941), 117 F. 2d 191, 193.

In re V-I-D, Inc. (C.A. 7, 1955), 226 F. 2d 113.

In view of the order of the District Court approving the appraisal of the properties of Ronrico Corporation (Record Appendix, A45), from which petitioner did not attempt to appeal, it is apparent that the order approving the Plan of Reorganization and the order confirming the Plan increase, rather than diminish, the petitioner's potential property; decrease, rather than increase, his burdens; and affect his rights beneficially rather than to his detriment. Without these orders petitioner would have nothing over which to continue his litigation; with them he has a contingent lien on some $99,000.

The order classifying creditors and stockholders, and the order directing the manner in which the Plan is to be consummated, can hardly be considered as aggrieving petitioner.

Peckham would seem to be in a position analogous to that of the appellant in the 1955 episode in the *V-I-D* case, *supra* (226 F. 2d 113). There an appeal was taken from the overruling of appellant's objections to the confirmation of an amended plan of reorganization. There, as here, the District Court had earlier held that the fair value of the assets of the debtor was insufficient to cover any portion of the appellant's claim. No appeal was taken from the prior orders, and the court held that they were not subject to review on appeal from the later orders. The appeals were dismissed upon the ground that the appellant had no appealable interest in the orders from which she had appealed.

Peckham's strategy is not unlike that condemned by the Court of Appeals for the Seventh Circuit in the 1955 episode in the *V-I-D* case, *supra*. Peckham made no effort to appeal from the order of May 3, 1957, approving the trustee's report under section 167 of the Act, and thus absolving Puerto Rico Distilling Company from charges of mismanagement. Peckham made no effort to appeal from the order of December 21, 1957, approving the report of the

appraisers and thus establishing that there was no equity in Ronrico Corporation for the common stock upon which Peckham claims a contingent lien. Peckham made no effort to appeal from the order of March 21, 1958, overruling his objections to the Plan of Reorganization, and denying his motion to dismiss the proceedings. As a result, he is bound by these orders, whether or not he became a party to the proceedings in the District Court. He would now like, as in the *V-1-D* case, to obtain a dismissal of the proceedings in the District Court, and thus erase all of these orders from the record, and be free to litigate in another tribunal.

To achieve this result, he not only refrained from intervening in the lower court (thus avoiding a recognition of the propriety of the main suit), but now seeks to appeal from orders which in no way aggrieve him (rather than from those orders in which he might have had a legitimate interest).

As an illustration of the petitioner's strategy, the attention of the Court is called to the charges made on page 5 of the Petition to the effect that the "plan was a perversion of the Chapter X judicial machinery for the purpose of accomplishing a violation of the Anti-Trust laws of the United States and also of Puerto Rico, and a violation of the Internal Revenue laws of the United States; and that the plan was the result of collusion between the Meyer and Puerto Rico Distilling Company stockholders to avoid Petitioner's asserted liens and to accomplish the aforesaid unlawful objects."

These matters were presented to the District Court (Record Appendix, A30, A69), and were resolved by the District Court in its order of March 21, 1958 (Record Appendix, A74, A75, A76), as follows:

> "No evidence has at any time been offered to the Court by Peckham in support of the original objec-

tions, filed on June 11, 1957; and no evidence was offered at the hearing of February 28, 1958 in support of either the old or the new objections. In fact, the new objections do not contemplate the introduction of evidence, but in each paragraph expressly rely upon what appears on the face of the amended plan and in the record of the proceedings.

"At the hearing on February 28, 1958, Mr. Darlington stated that he had no evidence to offer in support of his objections, and asked for, and was granted, a period of five days in which to file further specifications and a memorandum in support of his objections. This period has now elapsed, and no supporting memorandum or specifications have been filed by counsel for Peckham.

"It appears to the Court that the objections to original plan and to the amended plan which have been filed on behalf of Peckham are based on mere suspicion; have not been supported by any evidence and (are) based wholly upon the unsworn and unsupported statement of counsel for Peckham. The amended plan and the record of these proceedings in no way support Peckham's contentions."

Significantly, no appeal was taken from this order, which decided, in the plainest possible language, each and every one of the objections which Peckham had urged to the Plan and to the proceedings themselves.

B. The appeals are mere collateral attacks upon prior orders of the District Court which are now final and unappealable.

As has been pointed out, there are in this proceeding at least three basic orders upon which the plan of reorganization is based; namely:

(1) The order of May 3, 1957, approving the report of the trustee under section 167 of the Act (Record Appendix, A17);

(2) The order of December 26, 1957, approving the report of the appraisers (Record Appendix, A45); and

(3) The order of March 21, 1958, overruling Peckham's objections to the Amended Plan of Reorganization, and denying his motion to dismiss the proceedings in the District Court (Record Appendix, A74).

Each of these orders was plainly appealable and, had Peckham made a timely motion for leave to intervene, there is no doubt that he might have appealed from any one, or all, of them. Each of the three orders would seem to have the requisite finality for an appeal. The order of May 3, 1957, was obviously intended to determine, and did determine, that a claim against Puerto Rico Distilling Company was not among the assets of the debtor. The order of December 26, 1957, was obviously intended to determine, and did determine, the going concern value of the debtor, and was in turn based upon the order of May 3, 1957, in that the appraisers did not include, and could not have included, a claim against Puerto Rico Distilling Company as one of the assets of Ronrico Corporation. The order of March 21, 1958, was intended to determine, and did determine, that the District Court was not going to use its discretion and dismiss the proceedings under section 236 of the Act.

Each of the orders was final in the sense that it stated in clear and formal language the last word of the lower court on the particular problem involved; and the parties to the proceedings, as well as Peckham, were on notice that these orders were intended to be basic building blocks in the preparation of a plan of reorganization.

The Court of Appeals for the Seventh Circuit, in *In re Trust No. 2988 of Foreman Trust & Savings Bank*, *supra*, at page 943, states the rule as follows:

> "... An order in bankruptcy proceedings, from which either an absolute or discretionary appeal may

be had, may be reviewed only upon an appeal from that order and not on an appeal from a subsequent order. (Citing cases) Otherwise a party might permit the time within which to appeal from an interlocutory order to expire and then by an appeal from a final order, by indirection, achieve a review of something which it was not entitled to review."

In *In re Irving-Austin Building Corp.* (C.A. 7, 1938), 96 F. 2d 905, the same court said, at page 906:

"An order in a bankruptcy proceedings, from which appeal may be had, may be reviewed only upon an appeal from that order and not on an appeal from a subsequent order. Nor may a party refrain from direct attack by motion to modify or by appeal from an order and later collaterally attack the same by an appeal from a later order, in which the court overrules an objection attempting to raise a question disposed of by the previous order. . . . This court cannot, upon appeal from the order of confirmation, review the order of classification previously entered."

Marcy v. *Miller* (C.A. 10, 1938), 95 F. 2d 611.
Matter of Louis Joilet Garage Corp. (C.A. 7, 1938), 100 F. 2d 751.

C. An order approving a plan of reorganization under section 174 of the Act is not an appealable order.

In No. 5389 appellant has purported to appeal from the order entered by the lower court on April 8, 1958, approving a plan of reorganization under section 174 of the Act.

The Act does not contemplate that an order approving a plan under section 174 should in any sense be a final order. Section 180 of the Act expressly provides:

"The order of the judge approving a plan, as provided in section 174 of this Act, shall not affect the

right of the debtor, a creditor, indenture trustee, or stockholder to object to the confirmation of the plan."

While section 24 of the Act grants appellate jurisdiction to the Courts of Appeals in proceedings in bankruptcy, either interlocutory or final, to review, affirm, revise or reverse, both in matters of law and in matters of fact, the appellate courts have wisely refused to review interlocutory orders not having a certain degree of finality. As was stated in *Hoehn* v. *McIntosh* (C.A. 6, 1940), 110 F. 2d 199, 201:

"... Before reviewable, administrative orders must have a certain degree of finality. The salutary purpose of the legislation would be destroyed if every order, no matter how trivial, were subject to review. The Act does not contemplate tying up the estate and prolonging administration by appeals, unless the subject has been finally disposed of in the lower court and practically nothing remains to be done in that respect, so that rights may be definitely determined by review."

D. The appeals taken on June 13, 1958, were prematurely taken, and the Court of Appeals was without jurisdiction to hear the same.

The notice of appeal in No. 5390 (Record Appendix, A103) states that the appeals are taken "from the District Court's order entered herein on June 13, 1958, and each of them, including specifically the Order granting the Trustee's petition for classification of creditors, the Order granting Puerto Rico Distilling Company's petition to amend the Amended Plan, and the Order confirming said Plan as thus amended."

The record reveals (Record Appendix, A112) that on June 13, 1958, the District Court in this case entered no

orders of any kind. What occurred is set forth in the transcript of the hearing held on June 13, 1958, and the action taken by the District Judge is succinctly stated by the District Judge himself as follows:

> "To come sharply and briefly to the point of the morning's session, the several objections to the motion for confirmation of the plan of reorganization, and to the Puerto Rico Distilling Company's amended petition for confirmation of the plan, are denied and overruled. The motion for confirmation of the plan and the amended petition for confirmation of the plan are severally granted and allowed; the confirmation (consummation?) and the operation of the plan to take form as outlined in the amended petition for confirmation. *I charge Mr. de la Haba with the preparation of both orders which have been announced.* First, the one sustaining his petition for the classification of creditors and stockholders; secondly the one which I now announce. *He should, of course, submit them to counsel and then submit them for signature.*" (Italics supplied.) (Record Appendix, A101, A102.)

The docket entry (Record Appendix, A112) made by the Clerk following the hearing on June 13, 1958, reads as follows:

> "Case called for hearing on motions pending. Oral mot. of R. E. Peckham to pet. of trustee to classify creditors & stockholders heard & overruled. Said pet. of trustee granted. Argument heard on mot. for confirmation of plan of reorganization & objections thereto. Objections denied & overruled & mot. for confirmation of plan & amended pet. for confirmation of plan granted. Mr. de la Haba directed to prepare orders."

The transcript of the record of the hearing of June 13, 1958, and the subsequent action of the Judge and the Clerk leave no doubt that the Judge of the District Court did not intend the statements made from the bench at the hearing on June 13, 1958, to be his final act on the question of confirmation of the Plan, classification of creditors and stockholders, or on the amended petition of Puerto Rico Distilling Company for confirmation. Counsel for petitioner could not reasonably have been misled or confused by the situation. He was present in the District Court. He obviously heard the statements made by the District Judge, since, immediately after the lower court's statement, counsel stated:

> ". . . Now, it will be my purpose to file, probably today, a notice of appeal from the order just entered confirming the plan . . ." (Record Appendix, A101, A102.)

The orders which the District Judge referred to were in fact entered on June 19, 1958. The docket entries for June 13 and June 19, 1958, are copied in full in the Record Appendix, pages A112, A113.

The result is that Peckham failed entirely to invoke the jurisdiction of the Court of Appeals by the document which he filed on June 13, 1958 (Record Appendix, A103).

The jurisdiction of a Court of Appeals in matters of bankruptcy is wholly statutory, and must be found, if at all, in the provisions of section 24 of the Bankruptcy Act. The manner of invoking this jurisdiction is set out in section 25 of the Act. This latter section provides:

> "Appeals under this Act to the United States Courts of appeals *shall be taken within thirty days after written notice to the aggrieved party of the entry of the judgment*, order or decree complained of, proof of which notice shall be filed within five days after service

or; if such notice be not served and filed, then within forty days from such entry." (Italics supplied.)

Bankruptcy General Orders Nos. 36 and 37 make the Federal Rules of Civil Procedure generally applicable to bankruptcy practice.

Specifically, General Order 37 provides that "in proceedings under the Act the Rules of Civil Procedure for the District Court of the United States shall, in so far as they are not inconsistent with the Act or with these general orders, be followed as nearly as may be."

It would thus seem that we may properly turn to the Rules of Civil Procedure for an indication of the meaning of the phrase "entry of judgment" as used in section 25 of the Bankruptcy Act. In Rule 58 we find the following:

> "When the court directs that a party recover only money or costs or that all relief be denied, the clerk shall enter judgment forthwith upon receipt by him of the direction; but when the court directs entry of judgment for other relief, *the judge shall promptly settle or approve the form of the judgment and direct that it be entered by the clerk.* The notation of a judgment in the civil docket as provided in Rule 79(a) constitutes the entry of the judgment; and the judgment is not effective before such entry." (Italics supplied.)

The meaning of the phrase "entry of judgment" has been recently explored in the case of *United States* v. *F. & M. Schaefer Brewing Co.* (1958), 356 U.S. 227, 78 S. Ct. 674, 2 L. Ed. 2d 721, in which this Court stated, at page 232:

> "While an opinion may embody a *final decision*, the question whether it does so depends upon whether the judge has or has not clearly declared his intention in this respect in his opinion. Therefore, when, as here, the action is for money only—whether for a liquidated

or an unliquidated amount, as Rule 58 makes no such distinction—it is necessary to determine whether the language of the opinion embodies the essential elements of a judgment for money and clearly evidences the judge's intention that it shall be his final act in the case. If it does so, it constitutes his final judgment and, under Rule 58, it 'directs that a party recover [a sum of] money,' and, 'upon receipt by [the clerk] of the [opinion],' requires him to 'enter judgment forthwith' against the party found liable for the amount awarded, which is to be done by making a brief 'notation of [the] judgment in the civil docket [showing the substance of the judgment of the court] as provided by Rule 79(a).' When all of these elements clearly appear final judgment has been both pronounced and entered, and the time to appeal starts to run under the provisions of Rule 73(a)."

This would seem to concur with the analysis made by the Court of Appeals for the First Circuit in *In re Forstner Chain Corp.* (C.A. 1, 1949), 177 F. 2d 572, 576.

Unlike the situation in the *Schaefer* case, *supra*, the entire record need not be examined to determine the intention of the District Judge. There can be no doubt that the District Judge intended, as is in fact required by the second clause in Rule 58, to enter a formal order. He said: "I charge Mr. de la Haba with the preparation of both orders which have been announced. . . . He should, of course, submit them to counsel and then submit them for signature." It is difficult to conceive of clearer language.

The Judge of a District Court clearly has this power. As Mr. Justice Frankfurter says in the *Schaefer* case (at pages 241-242):

"Of course the court may, in the exercise of its control over the shape of the judgment and the time of

its rendition, indicate that no judgment will be rendered until a formal document is drawn up, approved, and signed. The Rules themselves recognize that in many cases, according to the relief awarded, the careful formulation of a separate judgment may be indispensable to the proper disposition of the litigation. Moreover, a formal document evidencing the judgment may in some circumstances be necessary for execution, for registration under state law, for divers purposes unrelated to the taking of an appeal."

The quoted language used by the District Judge can only mean that the District Judge intended to exercise the control to which Mr. Justice Frankfurter refers.

A premature appeal does not invoke the jurisdiction of the appellate court.

In *United States* v. *Crescent Amusement Co.* (1944), 323 U.S. 173, 65 S. Ct. 254, 89 L. Ed. 160, this Court held that a premature appeal was a nullity, and granted a motion to dismiss.

In *Wright* v. *Gibson* (C.A. 9, 1942), 128 F. 2d 865, 866, appeal was taken from an opinion concluding with the words: "the motion . . . is granted." In dismissing the appeal the court said:

"Actually, no order dismissing the second count was ever entered. Indeed, so far as the record shows, no order, judgment or decree of any kind was ever entered in this case. The opinion was not an order, judgment or decree. Its filing, therefore, did not constitute the entry of an order, judgment or decree, nor did the clerk's statement that 'said motions are granted' constitute such an entry. Thus at the time the notice was filed, there was nothing from which an appeal could be taken."

In *Stevens v. Turner* (C.A. 7, 1955), 222 F. 2d 352, 354, an appeal was taken from a summary judgment for support and maintenance. At the time the appeal was taken there was pending a motion of the judgment debtor to amend the judgment by reducing the total amount of the recovery. Of significance for the instant case is the fact that in the *Stevens* case the motion to amend the judgment was overruled by the trial court after the appeal was taken. In granting a motion to dismiss the appeal the court said:

"It follows, we think, that defendant's appeal, taken while his motion to amend the judgment was pending, was premature. We acquired no jurisdiction by virtue of it and no after-occurring action or event can inject vitality into it. United States v. Crescent Amusement Co., 323 US 173, 177, 65 S Ct 254, 89 L ed 160; R.F.C. v. Mouat, 9 Cir., 184 F 2d 44. The factual situations involved in the cases last cited and in Studer v. Moore, 2 Cir. 153 F 2d 902, are essentially identical with that before us. In each, a substantive motion intervened between the entry of judgment and the taking of the appeal. In each the motion was thereafter disposed of prior to the appellate tribunal's consideration of the jurisdictional question. In each a judgment of dismissal was entered. The Court of Appeals for the Second Circuit aptly observed, in Studer v. Moore, 153 F 2d at page 903, 'Although it must be owned that the defect is purely formal, it concerns our jurisdiction, and, in spite of our first impression to the contrary, we see no escape from holding that, since the original appeal did not remove the cause, nothing done thereafter in the District Court (could cure the defect).'"

Conclusion.

For the reasons set forth, it is respectfully submitted that the petition for writ of certiorari should be denied.

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